UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: December 14, 2000)
(Decided: August 23, 2001)

Docket No. 00-7630

MARK LEVY, Derivatively on behalf of Immunogen Inc.,

Plaintiff-Appellant,

v.

SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.

Defendant-Appellee.

– and –

IMMUNOGEN, INC.,

Nominal-Defendant-Appellee.

BEFORE: FEINBERG, PARKER, *Circuit Judges*, and COVELLO, *District Judge*.*

In this shareholder derivative suit claiming disgorgement of short swing profits, plaintiff-appellant appeals from an opinion and order of the District Court for the Southern District of New York, (Buchwald, J.), entered on May 15, 2000, granting the defendant's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6).

AFFIRMED.

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* The Honorable Alfred V. Covello, Chief Judge of the United States District Court for the District of Connecticut, sitting by designation.

Jeffrey S. Abraham, Law Office of Jeffrey S. Abraham, New York, NY, *for Appellant.*

Herbert Teitelbaum, Peter Sapanoff, Noah Weissman, Robinson Silverman Pearce Aronsohn & Berman LLP, New York, NY, *for Appellee.*

Allan A. Capute, Eric Summergrad, Meyer Eisenberg, David M. Becker, General Counsel, for the Securities and Exchange Commission, *Amicus Curiae.*

PARKER, *Circuit Judge:*

Plaintiff-appellant, Mark Levy ("Levy"), is a shareholder of ImmunoGen, Inc ("ImmunoGen"). He brings this shareholder derivative action alleging that defendant, Southbrook International Investment, Ltd. ("Southbrook"), by virtue of its ownership of ImmunoGen convertible preferred shares, is a more than 10% beneficial owner of ImmunoGen common stock and realized short swing profits through the purchase and sale of ImmunoGen stock within a six month period. Plaintiff-appellant seeks disgorgement of Southbrook's profits as required by Section 16(b) of the Securities and Exchange Act of 1934 as amended, 15 U.S.C. § 78p(b) ("the Exchange Act").

Article III, Paragraph 3.10 ("the conversion cap") of the Convertible Preferred Stock Purchase Agreement between ImmunoGen and Southbrook ("the Agreement") provides that Southbrook may not convert shares to the extent that such conversion would result in Southbrook owning more than 4.9% of ImmunoGen's outstanding common stock.

There is no claim that Southbrook ever exceeded the conversion cap. Rather, plaintiff-appellant claims that due to Southbrook's ability to make limited conversions and sales over a sixty-day period it could have cumulatively owned more than 10% of ImmunoGen's common stock within the meaning of 17 C.F.R. § 240.13d-3(a) and 13d-3(d)(1)(i) ("Rules 13d-3(a) and 13d-3(d)(1)(i)," respectively). Therefore,

according to plaintiff-appellant, Southbrook is a more than 10% beneficial owner within the meaning of Section 16(b) and subject to Section 16(b) short-swing trading liability.

In the alternative, plaintiff-appellant contends that: (1) the Agreement is void as a "sham transaction"; (2) the conversion limitation provision is void pursuant to 17 C.F.R. § 240.13d-3b ("Rule 13d-3(b)");[1] and (3) the conversion limitation constitutes a waiver of section 16(b), and therefore is void pursuant to Section 29(a) of the Exchange Act as amended, 15 U.S.C. § 78cc(a).[2]

Southbrook counters that, because the conversion cap prevents Southbrook from owning, at any one point, more than 4.9% of ImmunoGen's common stock, Southbrook is not a more than 10% beneficial owner within the meaning of Rules 13d-3(a) and 13d-3(d)(1)(i), and consequently, is not subject to Section 16(b) short-swing trading liability. Additionally, according to Southbrook, because the conversion cap is valid and binding, plaintiff-appellant's alternative grounds for relief are inapplicable.

We conclude that where a binding conversion cap denies an investor the right to acquire more than 10% of the under-

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[1] Rule 13d-3(b) reads as follows:

> Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose of [sic] effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d) or (g) of the Act shall be deemed for purposes of such sections to be the beneficial owner of such security.

17 C.F.R. § 240.13d-3(b).

[2] 15 U.S.C. § 78cc(a) reads as follows: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." 15 U.S.C. § 78cc(a).

lying equity securities of an issuer, at any one time, the investor is not, by virtue of his or her ownership of convertible securities, the beneficial owner of more than 10% of those equity securities within the meaning of Rules 13d-3(a) and 13d-3(d)(1)(i). We further find that the conversion cap in this case is binding, and accordingly, affirm the decision of the district court.

I. BACKGROUND

The allegations in the complaint disclose the following. On October 16, 1996 Southbrook and ImmunoGen entered into the Agreement. Pursuant to the agreement Southbrook agreed to purchase Immunogen convertible preferred stock. The Agreement limits Southbrook's ability to convert the preferred stock to the extent that such conversion would result in Southbrook owning more than 4.9% of the common stock, at any one time. The conversion cap in part reads as follows:

> 3.10 *Purchaser Ownership of Common Stock.* The Purchaser may not use its ability to convert Shares hereunder or under the terms of the Vote Certificates or to exercise its right to acquire shares of common stock under the Warrants to the extent that such conversion or exercise would result in the Purchaser owning more than 4.9% of the outstanding shares of the Common Stock.

Joint App. at 36 (Convertible Preferred Stock Purchase Agreement, ¶ 3.10).

Plaintiff-appellant alleges that by February 21, 1997, Southbrook was a more than 10% beneficial owner of ImmunoGen's outstanding common stock by virtue of Southbrook's ownership of ImmunoGen convertible preferred stock. The complaint further alleges that between January 1 and February 4, 1997, Southbrook acquired ImmunoGen common shares through conversion and sold them presumably at a profit. Southbrook allegedly repeated this process between January 27 and August 4, 1997, and again in October 1997.

On December 28, 1998, plaintiff-appellant demanded that ImmunoGen's Board of Directors bring an action to cause Southbrook to disgorge its alleged, short swing profits. *See Levy v. Southbrook International Investments, Ltd.*, No. 99 Civ. 1480 NRB, 2000 WL 567008, at *2 (S.D.N.Y. May 10, 2000). By letter dated February 18, 1999, the Board refused, and this suit followed. *See id.*

Plaintiff-appellant, Mark Levy, derivatively on behalf of ImmunoGen, brought this action for disgorgement pursuant to Section 16(b) of the Exchange Act, claiming that Southbrook improperly profited from its investment in ImmunoGen because it was a more than 10% beneficial owner of ImmunoGen's common stock. *See id.* at *1. Southbrook filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim, on the ground that the conversion cap prevented it from being a more than 10% beneficial owner of ImmunoGen common stock. *See id.* Southbrook's motion to dismiss was accompanied by an affidavit and copies of various documents referred to in the complaint.[3]

The district court, in a written opinion, granted Southbrook's motion to dismiss. *See id.* It found plaintiff-appellant's beneficial ownership argument inconsistent with precedent in this Circuit. *See id.* (citing *Levner v. Saud*, 903 F. Supp. 452 (S.D.N.Y. 1994), *aff'd*, *Levner v. Prince Alwaleed*, 61 F.3d 8 (2d Cir. 1995)). Additionally, the district court concluded that "it is clear that only those holders of derivative securities, who could acquire ownership, by conversion or otherwise,

[3] We note that it was appropriate for the district court to refer to the documents attached to the motion to dismiss since the documents were referred to in the complaint. *See Yak v. Bank Brussels Lambert, BBL (USA) Holdings Inc.*, 252 F.3d 127, 130 (2d Cir. 2001) ("On a motion to dismiss, the court may consider any written instrument attached to [the complaint] as an exhibit or any statements or documents incorporated in it by reference.") (citation and internal question marks omitted).

of more than 10% of the common stock, at one time, are subject to § 16(b) liability." *Id.* at *10 (emphasis in original).

Finally, in response to plaintiff-appellant's alternative grounds for relief, the district court held that: (1) because conversion caps are legitimate the sham transaction doctrine was inapplicable; (2) since there was no plan or scheme to evade, and the plaintiff did not allege such in his complaint, the conversion cap was not void pursuant to Rule 13d-3(b); and (3) Section 29(a) applied only to express waivers of noncompliance, and there was no such waiver here. *See id.* at *4-5.

Plaintiff-appellant filed a timely notice of appeal on May 17, 2000. On appeal, he challenges the district court's grounds for dismissing his complaint. After hearing oral argument in this case on December 14, 2000, the panel requested and received an amicus curiae brief from the Securities and Exchange Commission which provided support for defendant-appellee's position.

II. DISCUSSION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

We review a district court's dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6) de novo. *See Feder v. Frost*, 220 F.3d 29, 32 (2d Cir. 2000). Issues of statutory interpretation are also reviewed de novo. *See United States v. Proyect*, 989 F.2d 84, 87 (2d Cir. 1993). Although on a motion to dismiss a court must accept all factual allegations as true and draw all inferences in the plaintiff's favor, *see Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994), dismissal is appropriate if the plaintiff can prove no set of facts that would entitle him to relief. *See Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998).

Additionally, this Court is "bound by the SEC's interpretations of its regulations in its amicus briefs, unless they are plainly erroneous or inconsistent with the regulations," *Press*

v. Quick & Reilly, Inc., 218 F.3d 121, 128 (2d Cir. 2000) (citation and internal quotation marks omitted).

Section 16(b) of the Exchange Act compels corporate insiders to disgorge profits earned on purchases and sales of securities made within six months of each other. *See* Securities and Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b). "Liability under § 16(b) does not attach unless the plaintiff proves that there was (1) a purchase and (2) a sale of securities (3) by an officer or director of the issuer or by a shareholder who owns more than 10% of any one class of the issuer's securities (4) within a six month period." *Gwozdzinsky v. Zell/Chilmark Fund, L.P.*, 156 F.3d 305, 308 (2d Cir. 1998) (emphasis added). In other words, only officers, directors, and persons who beneficially own more than 10% of an issuer's common stock are subject to Section 16(b) short swing trading liability. Inasmuch as Southbrook is neither an officer nor a director of ImmunoGen, Section 16(b) liability can attach only if it is a more than 10% beneficial owner. Therefore, the issue presented is whether Southbrook, despite the existence of the 4.9% conversion cap, is a more than 10% beneficial owner of ImmunoGen's common stock.

A. *An Investor Subject to an Effective, Binding Conversion Cap of 4.9% is Not a More Than 10% Beneficial Owner of the Underlying Equity Stock*

Section 16(b) does not define the term "more than 10% beneficial owner," but Rule 16a-1 promulgated thereunder provides that "for the purposes of determining whether a person is a beneficial owner of more than 10% of any class of equity securities . . . the term 'beneficial owner' shall mean any person who is deemed a beneficial owner pursuant to Section 13(d) of the Act and the rules promulgated thereunder." *See* 17 C.F.R. § 240.16a-1(a)(1). Rule 13d-3, in turn, determines beneficial ownership. It states:

(a) For purposes of sections 13(d) and 13(g) of the Act a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:
(1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or,
(2) Investment power which includes the power to dispose, or direct the disposition of, such security. . . . .

(d) Notwithstanding the provisions of paragraphs (a) and (c) of this rule:
(1)(i) A person shall be deemed to be the beneficial owner of a security, subject to the provisions of paragraph (b) of this rule, if that person has the right to acquire beneficial ownership of such security, as defined in Rule 13d-3(a) (§ 240.13d-3(a)) within sixty days, including but not limited to any right to acquire: (a) Through the exercise of any option, warrant or right; (b) Through the conversion of a security, . . .

17 C.F.R. 240 § 13d-3(a) and (d)(1)(i).

As noted earlier, plaintiff-appellant argues that as a consequence of Southbrook's ability to dispose of more than 10% of ImmunoGen's common stock within sixty days through seriatum conversions and sales, Southbrook cumulatively had investment power over, and consequently was the beneficial owner of, more than 10% of ImmunoGen's common stock within the meaning of Rules 13d-3(a) and 13d-3(d)(1)(i). Southbrook responds that beneficial ownership depends on its right, at a given point rather than cumulatively over a sixty-day period, to acquire through conversion more than 10% of ImmunoGen's common stock.

The SEC's position, as set forth in its amicus brief to this Court supports defendant's reading of the Rule. According to the SEC, a holder of convertible securities that is subject to a binding conversion cap is not a more than 10% beneficial

owner of the underlying equity securities. *See* Brief of Amicus Curiae the Securities and Exchange Commission (No. 00-7630) at 14. "[T]he powers and rights one has must be evaluated as of the time of a transaction to determine whether one is required to file a report under Sections 13(d) and/or 16(a), and whether the transaction is subject to short-swing profit recovery under Section 16(b)." *Id.* at 20 (internal quotation marks omitted).

Pointing out that Rule 13d-3(d)(1)(i) speaks to the "right," not the "ability" to acquire, the SEC reasons that the investor's "right to acquire" stock is at all times subject to the conversion cap. *See id.* at 21. As long as an investor holds the maximum percentage of common shares allowed pursuant to the conversion cap, the investor does not have the "right to acquire" investment power over any of the convertible shares. *See id.* at 20-21. Only when the investor divests itself of sufficient shares of common stock to reduce holdings below the cap does any additional "right to acquire" come into being. *See id.* At that point the investor does not have voting power, investment power, or the "right to acquire" those powers, with respect to the divested shares. Nor does it have the "right to acquire" those powers by virtue of its conversion rights because the cap prohibits conversion so as not to exceed holdings in excess of 4.9% of the common stock. *See id.* Accordingly, the SEC reasons, the calculation of beneficial ownership is not cumulative. As we mention above, we are bound by the SEC's interpretation unless it is clearly erroneous or inconsistent with the regulation being interpreted. *See Press*, 218 F.3d at 128 (citation omitted).

Section 13(d) and the rules promulgated thereunder are reporting requirements intended to provide investors with early warnings of potential changes in control. The SEC brief explains the application of the Section 13(d) definition of beneficial ownership to short-swing trading cases under Section 16(b). The beneficial ownership threshold established for

disclosure of shareholder control under Section 13(d) is based on, at least in part, the power over corporate affairs associated with significant equity ownership. This power also implicates access to inside information and the potential for insider trading.

Upon adoption of the "within 60 day" language in the Rule the SEC said, "Rule 13d-3(d)(1)(i) deems a person to be the beneficial owner of a security if he has the right to acquire beneficial ownership of such security, at any time within sixty days, through: . . . (b) conversion of a convertible security . . ." *Filing and Disclosure Requirements Relating to Beneficial Ownership*, Exchange Act Release No. 14692, 14 SEC Docket 862, 1978 WL 14827 at *14 (April 21, 1978). It is obvious, given the purpose of the Rule, that the phrase "within sixty days" is intended to apply to the period within sixty days of a transaction which triggers the application of the Rule. The SEC also said that it was

> mindful that as the point in time in which the right to acquire may come to fruition is extended into the future the relation of the right's ability to influence control is correspondingly attenuated. When sixty days or less are left until the right to acquire may be exercised, the Commission believes that the ability of the holder of such right to affect control is sufficient to warrant the imposition of an obligation to file under Rule 13d-1.

See id. at *15.

This language suggests that the Commission was contemplating a time limitation in connection with the right to acquire the ability to control.

Viewing Rule 13d-3(d)(1)(i) in the context of its purpose, and operation, we find reasonable the SEC's reading of the Rule's "right to acquire" language. The SEC's use of "within sixty days" in Rule 13d-3(d)(1)(i) directs us to look not to the percentage of common shares cumulatively, beneficially

owned during a 60 day period as plaintiff-appellant argues, but rather, to whether the "right to acquire" inures at some point within sixty days of the acquisition. In short, "within sixty days" is a timing limit, not a direction to aggregate. Thus, beneficial ownership is determined at any one time, not cumulatively. This interpretation is consistent with the Supreme Court's instruction that Section 16(b) operate only within "narrowly drawn limits." *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232, 251 (1976). Moreover, this interpretation limits Section 16(b) short swing trading liability to those persons in a position to influence the value of stocks because they hold or have the "right to acquire", at any one time, more than 10% of the issuer's common stock. *See Morales v. Freund*, 163 F.3d 763, 766 (2d Cir. 1999) (explaining that the object of 16(b) is to avoid short swing profits by investors that may be able to influence the value of stocks in which they trade).

Accordingly, as long as the conversion cap in this case is binding, Southbrook cannot be the beneficial owner of more than 4.9% of ImmunoGen stock. At any one time, it cannot hold more than that amount of stock because it does not have the "right to acquire" more than 4.9% of ImmunoGen common stock "within sixty days" of each divestment. Because the SEC's position is neither plainly erroneous nor inconsistent with the regulations and comports with our interpretation, we adopt it. *See Press*, 218 F.3d at 128.

We now address plaintiff-appellant's arguments concerning the validity of the conversion cap itself.

B. *The Conversion Cap in This Case is Valid and Binding*

Plaintiff-appellant claims that the conversion cap in Paragraph 3.10 of the Agreement is not valid and binding because (1) it does not actually bind the purchaser to maintain an equity holding below the 4.9% threshold and thus is void as a sham transaction; 2) the conversion limitation provision is

void pursuant to Rule 13d-3(b); and 3) the conversion limitation constitutes a waiver of Section 16(b), and therefore is void pursuant to Section 29(a) of the Exchange Act.

The conversion cap in this case provides that:

> 3.10 *Purchaser Ownership of Common Stock.* The Purchaser may not use its ability to convert Shares hereunder or under the terms of the Vote Certificates or to exercise its right to acquire shares of common stock under the Warrants to the extent that such conversion or exercise would result in the Purchaser owning more than 4.9% of the outstanding shares of the Common Stock. The company shall, promptly upon its receipt of a Holder Conversion Notice tendered by the Purchaser (or its sole designee) under the Vote Certificates, and upon its receipt of a notice of exercise under the terms of any of the Warrants, notify the Purchaser by telephone and by facsimile of the number of shares of Common Stock outstanding on such date and the number of Underlying Shares and Warrant Shares which would be issuable to the Purchaser (or its sole designee, as the case may be) *if the conversion requested in such Conversion Notice or exercise requested in such exercise notice* were effected in full, whereupon, notwithstanding anything to the contrary set forth in the Vote Certificates or the Warrants, the *Purchaser may within one Trading Day of its receipt of the Company notice required by this Section by telephone or by facsimile revoke such conversion or exercise* to the extent that it determines that such conversion or exercise would result in the Purchaser owning in excess of 4.9% of such outstanding shares of Common Stock.

Joint App. at 36-37 (Convertible Preferred Stock Agreement, ¶3.10) (emphasis added).

Relying on the permissive "may" in the above provision, plaintiff-appellant argues that the Purchase Agreement is a sham[4] because Southbrook can, in its sole discretion, decide to own more than 4.9% of the common stock by simply not revoking the relevant exercise or conversion. Southbrook responds that, to the contrary, the above provision ensures compliance by permitting Southbrook to revoke any conversion to the extent that it would result in Southbrook owning more than 4.9% of ImmunoGen's stock.

We reject plaintiff-appellant's argument and instead agree with defendant-appellee. "A writing is interpreted as a whole." Restatement (Second) of Contracts § 202(2). "The intention of the parties is not derived from sentences or clauses read in isolation, but from the instrument as a whole." *Sure-Trip, Inc. v. Westinghouse Engineering*, 47 F.3d 526, 533 (2d Cir. 1995). On the whole, the conversion cap effectuates a clear prohibition on Southbrook's ability to convert shares to the extent that conversion would result in it owning in excess of 4.9% of ImmunoGen's outstanding common stock.

Additionally, the vote certificates provide that a conversion notice, once given, is irrevocable. In light of that provision, the clause relied on by plaintiff-appellant to prove that the conversion cap is a sham is properly interpreted as an exception to the irrevocability provision providing a means of ensuring compliance with the cap by granting Southbrook the ability to revoke a requested conversion to the extent that full exercise would exceed the cap. To separate the provisions of Paragraph 3.10 from each other and the other documents that constitute the parties' agreement "in order to give them an

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[4] "When the limitations provided by conversion caps are discovered to be illusory or a sham, they should be disregarded and the courts should analyze the case as though no such limitations existed." Amicus at 25-26; *see also Bershad v. McDonough*, 428 F.2d 693, 697 (7th Cir. 1970) ("[t]he commercial substance of the transaction rather than its form must be considered, and courts should guard against sham transactions . . . .").

assumed or [] abstract [] meaning, repugnant to their significance in the contract, would be to destroy, and not to sustain and enforce, the contract requirements," and we decline to do so. *Bowers Hydraulic Dredging Co. v. United States*, 211 U.S. 176, 188 (1908).

Additionally, plaintiff-appellant's argument is defeated by the fact that Southbrook may divest in order to stay under the cap, and therefore, it does not have to revoke to remain in compliance with the conversion cap.

Finally, we find plaintiff-appellant's remaining arguments to be without merit for substantially the same reasons as stated by the district court.

III. CONCLUSION

For the reasons set forth above, the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MANDATE

SDNY
99-cv-1480
Buchwald

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 23rd day of August, two thousand and one.

BEFORE:

Hon. Wilfred Feinberg,
Hon. Fred I. Parker,
Circuit Judges.
Hon. Alfred V. Covello,*
District Judge.

UNITED STATES
COURT OF APPEALS
FILED
AUG 23 2001
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

Docket No. 00-7630

MARK LEVY, Derivatively on behalf of Immunogen Inc.,

Plaintiff-Appellant,

V.

SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.,

Defendant-Appellee.

– and –

IMMUNOGEN, INC.,

Nominal-Defendant-Appellee.

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* The Honorable Alfred V. Covello, Chief Judge of the United States District Court for the District of Connecticut, sitting by designation.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by: /s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

A TRUE COPY
Roseann B. MacKechnie
by: /s/
DEPUTY CLERK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
Clerk

DC: SDNY
DC Docket: 99-cv-1480
DC Judge: Buchwald

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of November two thousand one.

MARK LEVY, Derivatively on behalf of Immunogen Inc.,

Plaintiff-Appellant,

v.

SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.,

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– and –

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Nominal-Defendant-Appellee.

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dkt #:
00-7630

UNITED STATES
COURT OF APPEALS
FILED
NOV 28 2001
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Mark Levy

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by: /s/ Arthur Heller
Arthur Heller
Administrative Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION AND ORDER

99 Civ. 1480 (NRB)

MARK LEVY, derivatively on behalf of Immunogen, Inc.,

Plaintiff,

– against –

SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.,

Defendant,

– and –

IMMUNOGEN, INC.,

Nominal Defendant.

NAOMI REICE BUCHWALD,
UNITED STATES DISTRICT JUDGE

Plaintiff Mark Levy ("Levy"), derivatively on behalf of Immunogen, Inc., brings this action for disgorgement pursuant to Section 16(b) of the Securities and Exchange Act of 1934, as amended, 15 U.S.C. § 78p(b) ("Exchange Act"), claiming that Southbrook International Investments, Ltd. ("Southbrook") improperly profited from its investment in ImmunoGen, Inc. ("ImmunoGen" or the "Company") by virtue of being a "beneficial owner of more than 10%" of ImmunoGen's common stock. Compl. ¶ 16. Now pending is Southbrook's motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim, on the ground that it was not a beneficial owner of that amount. For the reasons set forth below, defendant's motion to dismiss is granted.

BACKGROUND

As this Opinion is addressed to defendants' motion to dismiss, we rely exclusively on plaintiff's complaint for our recitation of the following facts. On October 16, 1996, Southbrook and ImmunoGen entered into a Convertible Preferred Stock Purchase Agreement ("the Agreement") by which Southbrook acquired various series of ImmunoGen preferred stock, yielding 9% per year, that were convertible into shares of common stock, under varying conversion formulas. Compl. ¶ 7. Plaintiff asserts that, pursuant to the Agreement, Southbrook acquired the right to own more than 10% of ImmunoGen common stock, thereby beneficially owning that amount for purposes of § 16(b) short-swing trading liability, and proceeded to trade in the Company's stock. Compl. ¶¶ 11-19.

However, the same Agreement contains a provision that prevents Southbrook from owning more than 4.9% of ImmunoGen's common stock at any time. The relevant provision, article III, paragraph 3.10 ("the conversion cap"), reads as follows:

> 3.10 *Purchaser Ownership of Common Stock.* The Purchaser may not use its ability to convert Shares hereunder or under the terms of the Vote Certificates or to exercise its right to acquire shares of common stock under the Warrants to the extent that such conversion or exercise would result in the Purchaser owning more than 4.9% of the outstanding shares of the Common Stock.

See Aff. of Kenneth Henderson ("Henderson Aff."), dated Oct. 19, 1999, Ex. 2 ("Agreement") at 13. Plaintiff does not in any way assert that Southbrook ever violated the conversion cap, but rather, that the cap did not prevent defendant from *beneficially owning* more than 10% of Immunogen's common stock. *See* Pl.'s Mem. at 7.

Plaintiff calculates that by February 21, 1997, Southbrook had the right to acquire, by exercising its conversion rights

under the Agreement, a total of 2,673,742 shares of ImmunoGen common stock, nearly 15% of the 17,933,328 shares then outstanding. Compl. ¶ 11. Plaintiff claims, based on Southbrook's ownership of convertible preferred stock, that between January 1 and February 4, 1997, while beneficially owning more than 10%, Southbrook acquired 1,384,823 common shares by conversion, and then sold them presumably at a profit. *Id.* ¶ 12. Southbrook allegedly repeated this process — trading in ImmunoGen common stock while owning the right to acquire more than 10% of it — between January 27, 1997 and August 4, 1997, and again in October 1997.[1] *Id.* ¶¶ 16, 17.

On December 28, 1998, plaintiff demanded that ImmunoGen's Board of Directors bring an action to disgorge Southbrook of its alleged, short-swing profits. Compl. ¶ 21. By letter dated February 18, 1999, the Board refused, and this derivative suit followed. Compl. ¶ 22.

DISCUSSION

A. *Fed. R. Civ. P. 12(b)(6) Standard*

Dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6) is warranted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Cooper v. Parsky*, 140 F.3d 433,

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[1] A cursory reading of the complaint might lead the reader to believe that Southbrook actually owned more than 10% of ImmunoGen's outstanding common stock. *See, e.g.*, Compl. ¶ 17. However, a closer examination reveals that plaintiff's calculations are based on the number of convertible preferred shares, not common shares, that Southbrook owned. For example, in reliance on a Proxy Statement filed by ImmunoGen on October 9, 1997, *see* Henderson Aff. Ex. 7, Levy alleges that Southbrook "owned 2,617,709 shares of [c]ommon [s]tock, which was more than the 10% of the 23,981,264 shares [outstanding]." Compl. ¶ 17. However, a review of note 4 of the Proxy Statement makes clear that the 2,617,709 shares are in fact the convertible preferred shares owned pursuant to the Agreement; indeed, the note makes specific reference to the Agreement as well as to its conversion cap of 4.9%. *See* Henderson Aff. Ex. 7 at 4.

440 (2d Cir. 1998) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In ruling on a Rule 12(b)(6) motion, a court is required "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980). Further, a court must accept all factual allegations in the complaint as true, and draw all inferences in the plaintiff's favor. *See Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994), *cert. denied*, 513 U.S. 816 (1994).

B. *Section 16(b) of the Exchange Act*

Section 16(b) of the Exchange Act provides that "a beneficial owner of more than ten percent of any class of equity security must turn over any profits earned, regardless of intent, from a purchase and sale of the securities occurring within six months." *Global Intellicom, Inc. v. Thomson Kernaghan & Co.*, 1999 WL 544708, *13 (S.D.N.Y. July 27, 1999).[2] The purpose of the statute is to "prevent[ ] the unfair use of information" which such beneficial owners, as well as officers and directors, are presumed to possess "by reason of [their] relationship to the issuer." 15 U.S.C. § 78p(b). Nevertheless, because such presumptive insiders are subject to strict liability,

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[2] Section 16(b) reads in pertinent part:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner . . . any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner . . . in entering into such transaction or holding the security purchased or of not repurchasing the security sold for a period exceeding six months.

15 U.S.C. § 78p(b). "Such beneficial owner" refers to "every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of equity security" in Section 16(a). 15 U.S.C. § 78p(a). *See Global Intellicom*, 1999 WL 544708, at *12 n.7.

regardless of their actual access to or use of inside information, section 16(b) should be narrowly construed. *See Gollust v. Mendell*, 501 U.S. 115, 122 (1991). Courts should avoid "literal, 'mechanical' application of the statutory text in determining who may be subject to liability," and should look instead to the "evil that Congress sought to correct through § 16(b)." *Id.* (quoting *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 425 (1972)).

"Beneficial ownership" for purposes of § 16(b) liability is defined in § 13 of the Exchange Act and regulations promulgated thereunder. 17 C.F.R. § 240.16a-1(a). Specifically, Rule 13-d defines the "beneficial owner" of a security as:

> Any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:
>
> (1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or
>
> (2) Investment power which includes the power to dispose, or to direct the disposition of such security.

17 C.F.R. § 240.13d-3(b).[3] A provision of the Rule, central to the facts of this case, further states that:

> [a] person shall be deemed to be the beneficial owner of a security . . . if that person has the right to acquire beneficial ownership of such security . . . within sixty days, including but not limited to any right to acquire: (A) [t]hrough the exercise of any option, warrant or right; [or] (B) through the conversion of a security; . . .

17 C.F.R. § 240.13d-3(d)(1)(i).

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[3] Levy concedes that because the convertible preferred shares it acquired were non-voting, only the "investment power" prong of Rule 13d-3(a) is at issue. *See* Pl.'s Mem. at 7.

C. *Levy's Theory of Beneficial Ownership*

The issue to be decided on this motion is whether Southbrook, despite the existence of the conversion limitation of 4.9%, had the right to acquire voting or investment power over more than 10% of ImmunoGen's common stock within 60 days. Plaintiff's theory is that the conversion cap only prevented Southbrook from owning more than 4.9% of ImmunoGen's common stock *at any one time;* the provision did not prevent defendant from owning, in blocks of 4.9%, cumulatively more than 10%, *at different times* during a sixty day period. *See* Pl.'s Mem. at 6-7 (alleging that Southbrook could exceed the statutory threshold "by *seriatim* converting, selling and then converting its preferred stock into more shares of the common stock").[4] We reject plaintiff's theory for several reasons.

First, contrary to plaintiff's contention that conversion caps are invalid, *see infra*, several courts in the Second Circuit have upheld conversion caps, such as the one present here, in the context of § 16(b). *See Levner v. Saud*, 903 F. Supp. 452 (S.D.N.Y. 1994), *aff'd*, *Levner v. Prince Alwaleed*, 61 F.3d 8 (2d Cir. 1995) ("*Levner II*"); *Global Intellicom*, 1999 WL 544708, at *16; *but see Schaffer v. Capital Ventures Int'l*, 98 Civ. 3900, slip op. (S.D.N.Y. Sept. 13, 1999). In *Global Intellicom*, a case involving the sale of convertible debentures, the relevant agreement provided that:

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[4] We note, incidentally, that three separate transactions must take place in order for defendant to actually own more than 10% of the issuer's equity: it would first have to convert preferred stock equivalent to 4.9% common stock, at which point it would own 4.9% of the common stock and beneficially own another 4.9% block of readily convertible preferred stock, a total of only 9.8% (step 1); it would then have to sell some converted common stock (step 2), because of the contractual limitation, in order to pave the way for the final step, conversion of additional preferred stock (step 3). Of course, the last transaction would result in a violation of the conversion cap.

> [t]he Purchaser agrees not to convert Debentures . . . to the extent such conversion or exercise would result in the Purchaser beneficially owning (as determined in accordance with Section 13(d) of the Exchange Act and the rules thereunder) in excess of 4.999% of the then issued and outstanding shares of Common Stock . . .

Id. at 16. In dismissing both § 13(d) and § 16(b) claims against the defendant, Judge Cote found that "this restriction is a sufficient restraint such that [the defendant-purchaser] is not the beneficial owner of more than 5% [of the issuer's] common stock." *Id.* As the Court reasoned, "holders of freely convertible securities are generally deemed to be beneficial owners of the underlying common stock. Where conversion rights are limited, however, a holder of a convertible security may not be deemed the beneficial owner of the underlying common stock." *Id.* at 15.[5]

Similarly in *Levner*, where an owner of 4.8% of Citicorp common stock purchased convertible preferred stock equal to an additional 10% common stock, Judge Preska relied in part on a conversion cap of 10% in finding that the defendant was not the beneficial owner of more than the cap amount. 903 F. Supp. at 461. Narrowly construing § 16(b) and considering the purpose and policy underlying the statute, the District Court found that the preferred stock was not "presently convertible" to more than 10% as a matter of law, and accordingly, the defendant was not a beneficial owner of more than 10%. *Id.* at 462. On appeal, the Second Circuit affirmed "the carefully reasoned opinion of Judge Preska," agreeing that the relevant purchase agreement prevented the defendant from "convert-[ing] his preferred shares in sufficient quantity, together with

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[5] Plaintiff's effort to distinguish Judge Cote's decision based on that case's conversion cap's specific reference to "beneficial ownership," Pl.'s Mem. at 9 (emphasis added), is unavailing as it is clear that Judge Cote's opinion did not turn on that specific language.

the common shares he already held, to render him the beneficial owner of more than 10 percent of Citicorp common stock." *Levner II*, 61 F.3d at 9.

Second, based on our independent analysis of Rule 13-d's provisions, we reject plaintiff's theory of beneficial ownership. Reading the Rule within the broader statutory framework, it is clear that only those holders of derivative securities, who could acquire ownership, by conversion or otherwise, of more than 10% of the common stock, at one time, are subject to § 16(b) liability. Notwithstanding the extremely strained interpretation of Rule 13d-3(1)(i) that plaintiff asks this Court to adopt,[6] we believe Congress intended to impose presumptive insider status and strict liability only under those circumstances. *See, e.g.*, *Morales v. Freund*, 163 F.3d 763, 766 (2nd Cir. 1999) ("core object of § 16(b) [is] the avoidance of short-swing profit[s] by investors who trade in stocks whose value they may be able to influence"). Thus we note, once again, that Southbrook was restricted by the Agreement's conversion cap from owning more than 4.9% of the outstanding common stock, at any one time, and thus was never a beneficial owner of more than the triggering amount.

Third, we consider plaintiff's theory to be extremely far reaching and overly broad. Taken to its logical extreme, the theory would seem to reach virtually any person who has the capacity (*i.e.*, wherewithal) to successively purchase and sell sufficient quantities of stock in a relatively short period of time. One might imagine a wealthy speculator who buys 1%

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[6] According to plaintiff's construction, the "Agreement only prevented Southbrook from owning more than 4.9% of [common stock] *at any one time*. However, Rule 13d-3(1)(i) . . . speaks in terms of the shares which *could be acquired within sixty days*. As such, the particular number of shares of common stock owned on any one day is *irrelevant* to the analysis of determining the beneficial ownership for purposes of Section 16(b)." Pl.'s Mem. at 7 (emphasis in original). We simply cannot accept plaintiff's suggestion that the number of shares a person could own at a single time is irrelevant.

of a company's common stock (or an equivalent amount of derivative securities), sells it shortly thereafter for a profit, and repeats this process ten or more times over a period of sixty days. Under plaintiff's theory, the person's mere ability to acquire more than 10% at different times within sixty days, while never resulting in his owning 10% at one time, would make him the beneficial owner of more than 10%. However, our confidence that § 16(b) was not intended to reach this hypothetical investor, causes us to be wary of plaintiff's theory, since if accepted, it would extend the statute's sweep beyond those with insider power and information.

In sum, plaintiff's argument as to beneficial ownership fails because it is inconsistent with clear precedent in this Circuit, requires an improperly broad construction of § 16(b) and its accompanying regulations, and would not serve the statute's underlying purposes. Accordingly, we find that in the absence of a violation of the conversion cap, Southbrook did not beneficially own more than 4.9% of ImmunoGen's common stock.

D. *Conversion Cap is Valid and Enforceable*

Alternatively, Levy argues that the Agreement's conversion cap, ¶ 3.10, is void and unenforceable pursuant to (1) the sham transaction doctrine, (2) Rule 13d-3(b), and (3) § 29(a) of the Exchange Act. *See* Pl.'s Mem. at 10-19. These arguments are without merit. First, the sham transaction doctrine, *see Bershad v. McDonough*, 428 F.2d 693, 697 (7th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971) ("[t]he commercial substance of the transaction rather than its form, must be considered, and the courts should guard against sham transactions. . ."), is inapplicable here, given that conversion caps have been upheld as a legitimate means of structuring a transaction to avoid § 16(b) liability. *See Global Intellicom*, 1999 WL 544708, at *1; *see also Reliance*, 404 U.S. at 422 ("liability cannot be imposed simply because the investor structured his transaction with the intent of avoiding liability under Section 16(b)").

Plaintiff's argument under Rule 13d-3(b),[7] which prohibits "contract[s], arrangement[s] or device[s]" that are "part of a plan or scheme to evade the [applicable] reporting requirements," similarly fails as there is no factual basis to support the existence of such a plan or scheme to evade, here. There is no allegation in plaintiff's complaint that Southbrook failed to disclose any aspects of the ImmunoGen transaction in applicable regulatory filings, or that defendant ever attempted to conceal any matter for the purpose of avoiding its reporting obligations.

Finally, plaintiff's § 29(a) argument, raised for the first time in plaintiff's opposition brief, also fails, as the statute applies only to parties' express waivers of non-compliance with the securities laws. No such waiver is pled here. Rather, the parties entered into a transaction that has been specifically sanctioned by the courts under the securities laws.

Accordingly, plaintiff's contentions that the conversion cap present here is invalid and unenforceable, fail.

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[7] Rule 13d-3(b), 17 C.F.R. § 240.13d-3(b), states, in relevant part:

> Any person who, directly or indirectly, creates or uses a . . . contract, arrangement or device with the purpose or effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d) . . . shall be deemed for purposes of such Sections to be the beneficial owner of such security.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is granted, and plaintiff's complaint is dismissed. The Clerk of the Court is directed to close the above captioned case.

IT IS SO ORDERED.

DATED: New York, New York
May 8, 2000

/s/ Naomi Reice Buchwald
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UNITED STATES DISTRICT JUDGE

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TITLE 15. COMMERCE AND TRADE
CHAPTER 2B. SECURITIES EXCHANGES
15 USCS § 78p (2001)

§ 78p. Directors, officers, and principal stockholders

(a) Filing of statement of all ownership of securities of issuer by owner of more than ten per centum of any class of security. Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 12 of this title [15 USCS § 78l], or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 12(g) of this title [15 USCS § 78l(g)], or within ten days after he becomes such beneficial owner, director, or officer, a statement with the Commission (and, if such security is registered on a national securities exchange, also with the exchange) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been a change in such ownership or if such person shall have purchased or sold a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) involving such equity security during such month, shall file with the Commission (and if such security is registered on a national securities exchange, shall also file with the exchange), a statement indicating his ownership at the close of the calendar month and such changes in his ownership and such purchases and sales of such security-based swap agreements as have occurred during such calendar month.

(b) Profits from purchase and sale of security within six months. For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the

issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) involving any such equity security within any period of less than six months, unless such security or security-based swap agreement was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security or security-based swap agreement purchased or of not repurchasing the security or security-based swap agreement sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security or security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

TITLE 15. COMMERCE AND TRADE
CHAPTER 2B. SECURITIES EXCHANGES
15 USCS § 78c (2001)

§ 78c. Definitions and application

(b) Power to define technical, trade, accounting, and other terms. The Commission and the Board of Governors of the Federal Reserve System, as to matters within their respective jurisdictions, shall have power by rules and regulations to define technical, trade, accounting, and other terms used in this title, consistently with the provisions and purposes of this title.

TITLE 15. COMMERCE AND TRADE
CHAPTER 2B. SECURITIES EXCHANGES
15 USCS § 78cc (2001)

§ 78cc. Validity of contracts

(a) Waiver provisions. Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

TITLE 17 — COMMODITY AND SECURITIES EXCHANGES

CHAPTER II — SECURITIES AND EXCHANGE COMMISSION

PART 240 — GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

SUBPART A — RULES AND REGULATIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934

REPORTS OF DIRECTORS, OFFICERS, AND PRINCIPAL SHAREHOLDERS

17 CFR 240.16a-1

§ 240.16a-1 Definition of Terms.

Terms defined in this rule shall apply solely to section 16 of the Act and the rules thereunder. These terms shall not be limited to section 16(a) of the Act but also shall apply to all other subsections under section 16 of the Act.

(a) The term beneficial owner shall have the following applications:

(1) Solely for purposes of determining whether a person is a beneficial owner of more than ten percent of any class of equity securities registered pursuant to section 12 of the Act, the term "beneficial owner" shall mean any person who is deemed a beneficial owner pursuant to section 13(d) of the Act and the rules thereunder; provided, however, that the following institutions or persons shall not be deemed the beneficial owner of securities of such class held for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business (or in the case of an employee benefit plan specified in paragraph (a)(1)(vi) of this section, of securities of such class allocated to plan participants where participants have voting power) as long as such shares are acquired by such institutions or persons without the purpose or effect of

changing or influencing control of the issuer or engaging in any arrangement subject to Rule 13d-3(b) (§ 240.13d-3(b)):

(i) A broker or dealer registered under section 15 of the Act (15 U.S.C. 78o);

(ii) A bank as defined in section 3(a)(6) of the Act (15 U.S.C. 78c);

(iii) An insurance company as defined in section 3(a)(19) of the Act (15 U.S.C. 78c);

(iv) An investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8);

(v) Any person registered as an investment adviser under Section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3) or under the laws of any state;

(vi) An employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. 1001 *et seq.* ("ERISA") that is subject to the provisions of ERISA, or any such plan that is not subject to ERISA that is maintained primarily for the benefit of the employees of a state or local government or instrumentality, or an endowment fund;

(vii) A parent holding company or control person, provided the aggregate amount held directly by the parent or control person, and directly and indirectly by their subsidiaries or affiliates that are not persons specified in paragraphs (a)(1)(i) through (ix), does not exceed one percent of the securities of the subject class;

(viii) A savings association as defined in Section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(ix) A church plan that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940 (15 U.S.C. 80a-3); and

(x) A group, provided that all the members are persons specified in § 240.16a-1(a)(1)(i) through (ix).

(xi) A group, provided that all the members are persons specified in § 240.16a-1(a)(1) (i) through (vii).

NOTE TO PARAGRAPH (A). Pursuant to this section, a person deemed a beneficial owner of more than ten percent of any class of equity securities registered under section 12 of the Act would file a Form 3 (§ 249.103), but the securities holdings disclosed on Form 3, and changes in beneficial ownership reported on subsequent Forms 4 (§ 249.104) or 5 (§ 249.105), would be determined by the definition of "beneficial owner" in paragraph (a)(2) of this section.

TITLE 17 — COMMODITY AND SECURITIES EXCHANGES

CHAPTER II — SECURITIES AND EXCHANGE COMMISSION

PART 240 — GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

SUBPART A — RULES AND REGULATIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934

REGULATION 13D

17 CFR 240.13d-3

§ 240.13d-3 Determination of beneficial owner.

(a) For the purposes of sections 13(d) and 13(g) of the Act a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:

(1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or,

(2) Investment power which includes the power to dispose, or to direct the disposition of, such security.

(b) Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose of effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d) or (g) of the Act shall be deemed for purposes of such sections to be the beneficial owner of such security.

(c) All securities of the same class beneficially owned by a person, regardless of the form which such beneficial owner-

ship takes, shall be aggregated in calculating the number of shares beneficially owned by such person.

(d) Notwithstanding the provisions of paragraphs (a) and (c) of this rule:

(1)(i) A person shall be deemed to be the beneficial owner of a security, subject to the provisions of paragraph (b) of this rule, if that person has the right to acquire beneficial ownership of such security, as defined in Rule 13d-3(a) (§ 240.13d-3(a)) within sixty days, including but not limited to any right to acquire: (A) Through the exercise of any option, warrant or right; (B) through the conversion of a security; (C) pursuant to the power to revoke a trust, discretionary account, or similar arrangement; or (D) pursuant to the automatic termination of a trust, discretionary account or similar arrangement; provided, however, any person who acquires a security or power specified in paragraphs (d)(1)(i)(A), (B) or (C), of this section, with the purpose or effect of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect, immediately upon such acquisition shall be deemed to be the beneficial owner of the securities which may be acquired through the exercise or conversion of such security or power. Any securities not outstanding which are subject to such options, warrants, rights or conversion privileges shall be deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by such person but shall not be deemed to be outstanding for the purpose of computing the percentage of the class by any other person.